IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ALEXANDER MICHAEL MALES, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	No. CV-07-416-HU FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff Alexander Males brings this action for judicial review of the Commissioner's final decision to deny disability insurance benefits (DIB) and supplemental security income (SSI). This Court has jurisdiction under 42 U.S.C. § 405(g). I recommend that the Commissioner's final decision be reversed and remanded for further proceedings.

PROCEDURAL BACKGROUND

Plaintiff applied for DIB and SSI in March 2004, alleging an onset date of March 1, 2002. Tr. 63-66, 262-64. His applications were denied initially and on reconsideration. Tr. 23-24, 30-34, 37-39, 265-74.

On September 11, 2006, plaintiff, represented by counsel, appeared for a hearing before an Administrative Law Judge (ALJ). Tr. 275-316. On October 24, 2006, the ALJ found plaintiff not disabled. Tr. 11-21. The Appeals Council denied plaintiff's request for review of the ALJ's decision. Tr. 5-7.

FACTUAL BACKGROUND

Plaintiff alleges disability based on seizures, left shoulder problems, and medication side effects. Tr. 147-48. He also contends that he suffers from depression.

At the time of the September 11, 2006 hearing, plaintiff was

thirty-one years old. Tr. 279. He has a high school education. Tr. 279. His past relevant work is as a punch press operator, a janitor, and working for a window manufacturer. Tr. 285-88.

I. Medical Evidence

The earliest medical record in the Administrative Record is dated October 13, 1998. Tr. 197-98. At the time, plaintiff was twenty-three years old. The report is of a follow-up visit with Dr. James R. Schimshock, M.D., of the "Child Neurology Clinic." Id. Dr. Schimshock noted that plaintiff had been seizure-free for sixteen months while taking 750 milligrams of Depakote, three times daily, and 100 milligrams of Lamictal, two times daily. Id. Dr. Schimshock further noted that plaintiff worked at an x-ray recycling facility and was living with an aunt who was supervising his medications. Id. He had no new health problems. Id. Dr. Schimshock made no changes to his medications and indicated he would see plaintiff again in nine months. Id.

In April 1999, plaintiff begin treating at Kaiser. Tr. 215. He saw Dr. Vicki L. Reid on April 27, 1999, to establish a primary care physician, and to request a referral to neurology. Id. In her report, Dr. Reid noted plaintiff's history of seizure disorder, with unknown etiology, since age fourteen. Id. Plaintiff reported that his last seizure was about one and one-half years ago, and that he had been tolerating the Depakote and Lamictal well. Id. He reported a slight tremor to his hands over the previous few months, but no other side effects. Id. He had no other health complaints at the time. Id.

On physical exam, Dr. Reid noted that plaintiff had a mild tremor in his hands, which she described as more of an "intention"

tremor[1] rather than a "resting" tremor. Id.

Plaintiff saw Kaiser neurologist Dr. Stephen Gancher, M.D., on April 10, 1999. Tr. 213-14. Plaintiff reported to Dr. Gancher that since age fifteen, he has had "generalized seizures," and that he also had "partial seizures" consisting of "left head turning and obtundation[.][2]" Tr. 213. He reported not having had any seizures in "awhile." Id. Plaintiff told Dr. Gancher that he was doing "reasonably well." Id. He worked full-time, swing shift, for a company that made x-ray trays, plastic walking casts, and other goods. Id. He did not describe any specific problems functioning, other than reporting that if he moves one hand, the other hand will move involuntarily. Id.

On physical exam, Dr. Gancher noted that plaintiff had, intermittently, a fine lateral head tremor. Id. He also noted that plaintiff had "mirror movements," which were "brought out when plaintiff would alternatively tap his index and long finger against the thumb and twitching of the contralateral index and long fingers were visible." Id.

Plaintiff next saw Dr. Gancher on March 2, 2001. Tr. 209-10. At the time, he was still taking 750 milligrams of Depakote, three times daily, and 100 milligrams of Lamictal, twice daily. Tr. 210.

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[1] A "[t]remor when voluntary motion is attempted." Taber's Cyclopedic Medical Dictionary 1482 (Clayton L. Thomas ed., 14th ed. 1981)

[2] "Obtund" means "[t]o make less intense; dull or deaden." American Heritage Dictionary of the English Language 1250 (3d ed 1992). One online source defines "obtundation" as "a dulled or reduced level of alertness or consciousness." http://www.medfamily.org/dictionary/O/terms-obtundation.phtml

Dr. Gancher noted that plaintiff was there primarily "to have a form filled out[,]" and that he had been out of work for a year. Id.

Plaintiff's aunt, who accompanied him to the appointment, stated that he was having problems with slow mentation and with hand and head tremors. Id. She further reported that he was having problems getting work. Id. She remarked that plaintiff works at a slower speed and learned more slowly than other adults. Id. She thought it was attributable to his medications, as he was quicker mentally before starting on anti-convulsants. Id.

On physical examination, Dr. Gancher noted that plaintiff had a very slight head tremor, causing at most a centimeter of movement. Id. There was a barely discernible hand tremor, although plaintiff's aunt noted that the tremor was much worse. Id. He had no nystagmus and was able to balance and walk in tandem. Id.

Dr. Gancher stated that plaintiff's seizures were under good control. Id. He indicated that it was possible that plaintiff might be experiencing some cognitive side effects from his medications, especially the Depakote. Dr. Gancher suggested that plaintiff lower the dose of Depakote and increase the dose of Lamictal, but plaintiff was disinclined to do this as his seizures have been fully controlled. Id. Dr. Gancher filled out a form for GoodWill, stating that plaintiff had some signs of tremor and some slowed mentation and difficulty concentrating. Id.

On March 7, 2001, plaintiff saw his primary care physician Dr. Reid. Tr. 209. She noted plaintiff's concern about changes to his medications as suggested by Dr. Gancher. Id. She indicated he was

still thinking about it, but unwilling to make any changes at that time. Id. Dr. Reid also noted plaintiff's "having some relationship and job stresses," which prompted plaintiff to inquire about a counselor. Id.

On physical examination, Dr. Reid noted a slight tremor in his hands, bilaterally, and remarked that he had a somewhat blunted affect. Id. She maintained him on his current medications, after plaintiff declined to make any changes to them. Id. She also noted that because the plaintiff was on the Oregon Health Plan, he should contact the mental health provider as indicated on his card. Id. Her assessment included an adjustment disorder. Id.

The next medical record in the Administrative Record is from Dr. Richard Koller, M.D., in Bend, Oregon, on February 25, 2003. Tr. 217-20. Dr. Koller notes that plaintiff was referred to him by Dr. David Evans for evaluation of a seizure disorder. Tr. 217. There do not appear to be any records from Dr. Evans in the Administrative Record.

Plaintiff reported to Dr. Koller that he had been taking Depakote and Lamictal, with no seizures for five years. Tr. 217. Plaintiff believed his last seizure was in 1996 or 1997. Id. Plaintiff reported that he experienced an occasional tremor and hair loss with the Depakote, but overall, he tolerated it very well. Id. He also reported being a bit slow in his thinking and speech, but felt he was doing reasonably well for the most part. Id. He reported no other major complaints neurologically. Id.

Dr. Koller recorded plaintiff's past medical history as including "shoulder/wrist/hand" surgery, and epilepsy. Id. He noted that plaintiff was looking for work and was on unemployment.

Id. In his review of systems, Dr. Koller noted, under the neurologic category, that plaintiff complained of tremor and shaking, but denied memory loss and trouble concentrating. Tr. 218. In the psychiatric system category, he noted that plaintiff denied depression, other emotional problems, and anxiety. Id. Dr. Koller noted that plaintiff was slow to respond during the mental status exam. Tr. 219.

On May 10, 2004, plaintiff saw Dr. Suzanne El-Attar, M.D., for an SSI consultative exam. Tr. 221. Dr. El-Attar noted that obtaining a complete history was a bit difficult because plaintiff seemed to have difficulty with dates "and some memory issues." Id.

Plaintiff identified two issues significant to his work status. Id. First, he noted a history of left shoulder dislocation, followed by surgery in 1995 or 1996. Id. Subsequent to the surgery, he no longer experienced dislocations, but he suffered from chronic pain and aching and decreased range of motion. Id. He reported that Tylenol helped the pain. Id.

Second, he identified his seizure disorder. Id. He reported that the seizures were controlled with his medications, but that the medications affect him with chronic tremors, difficulty with thought processes, and slurred speech. Id. Dr. El-Attar observed a resting tremor[3] in both hands, but no intention tremor. Id.

On physical examination, she found slightly decreased range of motion in his left shoulder. Tr. 222, 225. She concluded that

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[3] "[A] [t]remor present when the involved part is at rest by absent or diminished when active movements are attempted." Taber's 1492. See Footnote #1 for definition of "intention tremor."

plaintiff was limited by both his shoulder and his medications for seizures. Tr. 222. She limited him to twenty-five pounds of lifting with the left arm. Id.

While she indicated that he was affected by his seizure medications, and noted that his memory was not completely normal, she concluded that this would not likely impede him from certain types of jobs. Id. She thought the bigger limitation was the shoulder. Tr. 222-23.

On July 27, 2004, Dr. Martin Kehrli, M.D., completed a physical residual functional capacity assessment of plaintiff. Tr. 235-43. He concluded that plaintiff had no visual or communicative limitations. Tr. 238-39. He also concluded that plaintiff should avoid concentrated exposure to hazards such as machinery and heights. Tr. 239.

Dr. Kehril found that plaintiff had the following exertional limitations: frequently or occasionally lifting or carrying up to twenty-five pounds with the left upper extremity[4], standing or walking for six hours in an eight-hour day, and sitting for six hours in an eight-hour day. Tr. 236. For postural limitations, Dr. Kehril limited plaintiff to occasional climbing of ramp and stairs, and never climbing of ladders, ropes, and scaffolds. Tr. 237. He also concluded that plaintiff had the ability for only occasional overhead reaching in all directions with the left upper

[4] Dr. Kehrli's limitation to both "frequently" and "occasionally" is unclear. Occasionally refers to less than one-third of the time and frequently refers to less than two-thirds of the time. Tr. 236. If the limit is to lift up to twenty-five pounds frequently, this subsumes a limit of lifting up to twenty-five pounds occasionally.

extremity. Tr. 238.

On December 8, 2004, plaintiff was examined by Dr. Deborah Syna, M.D., of Northwest Neurological Specialists. Tr. 259-61. Dr. Syna notes that plaintiff was referred by Dr. Terrance Olson, M.D., and she refers to having reviewed plaintiff's medical records from Dr. Olson's office. Tr. 259. However, none of these records appears in the Administrative Record.

Plaintiff reported to Dr. Syna that he had not had a seizure in six or seven years. Id. He noted that he had episodes of "spacing out," which involved his head turning to the left and experiencing "brief episodes of time that seem to have gotten away from him." Id. Dr. Syna noted that plaintiff stated he had not had one of those types of episodes in a couple of years. Id. Plaintiff told Dr. Syna that his seizures were managed quite well by his current medication regime, which continued to be Depakote and Lamictal, but he complained of side effects including weight gain, grogginess, slurred speech, and tremor. Id. He also complained of mild depression and frustration at not being able to get, or hold a job. Id.

On mental status examination, Dr. Syna noted that plaintiff's affect was somewhat slow and that his speech was "ponderous." Tr. 260. On physical examination, she noted that he had a mild, intrinsic tremor of the head and hands. Id.

Her impression was that plaintiff had generalized epilepsy with intermittent blackouts, depression, and "[l]earning disabilities/unemployability." Id.

On February 4, 2005, plaintiff underwent a neuropsychological evaluation, at Dr. Syna's request, by Laurence M. Binder, Ph.D.

Tr. 243-47. On his mental status examination, Dr. Binder noted that plaintiff's affect was flat, his speech was a little slow, and he was slow on simple tests of attention and thinking speed. Tr. 244.

Dr. Binder administered more than a dozen tests to plaintiff to assess his neuropsychological functioning. Tr. 245. He discusses the results of these tests in some detail. Tr. 245-47. Overall, he concluded that the results of testing "are not clearly invalid, but they are not clearly valid either." Tr. 247. He noted that the results of validity testing were not consistent and there was the possibility that plaintiff was not always optimally motivated. Id.

Dr. Binder noted that plaintiff showed "clear superiority of verbal intellectual over visual thinking." Id. His verbal memory scores generally were normal except for verbal recognition memory on one test. Id. In contrast, he performed in atypical fashion on one of the visual memory tests, with his raw score declining from the first to the second trial. Id. Testing showed abnormal results on all timed measures requiring visuomotor and manual dexterity and fluency speed. Id.

Dr. Binder concluded that plaintiff may have some valid cognitive deficits in the area of visual thinking, thinking speed, visuomotor speed, and manual dexterity speed, as well as mental flexibility or problem solving. Id.

In December 2005, plaintiff began counseling sessions with therapist Misty McArthur and psychologist Ken Ihli, Ph.D. Tr. 248-57. He treated with them until August 25, 2006, a couple of weeks before his disability claim hearing before the ALJ. Id.

In the intake summary, McArthur and Dr. Ihli noted that plaintiff presented with symptoms of depression including depressed mood, fatigue, lack of energy, weight gain, feelings of guilt and worthlessness, poor concentration, and disturbed sleep, including insomnia. Tr. 248. Plaintiff reported that his depression was worse during the week and better on the weekends, because he goes out and does things. Id. The intake summary noted that his depression is exacerbated by the fact that he is unemployed and cannot keep a job due to his medical condition. Id. Plaintiff also reported being depressed about his finances and not having his own place to live. Id. Plaintiff reported that he had been depressed for "years" before beginning his current regimen of anti-convulsant medication that he had been taking for several years. Id.

In the "Impressions" section of the Intake Summary, McArthur and Dr. Ihli noted that plaintiff's speech was normal, but slightly soft, and that his affect was consistently flat throughout the interview with thought processes being somewhat overinclusive, making it difficult, at times, to keep him on task. Id. His judgment and memory appeared to be intact. Id.

In the "Clinical Formulation" section of the Intake Summary, McArthur and Dr. Ihli stated that plaintiff met the criteria for Major Depressive Disorder, Recurrent, Moderate, Chronic. Id. They noted that he had a history of years of depressive episodes. Id. They also stated that his medical condition had prevented him from being able to maintain steady employment and an independent living situation which had exacerbated his depression and promoted feelings of worthlessness and constant discouragement. Id.

Plaintiff's problem list was stated as depression and chronic/incapacitating medical illness. Tr. 249. He was rated as having a Global Assessment of Functioning (GAF) score of 52. Id. The goals were to elevate his mood and explore how depression may be related to chronic illness. Id.

Plaintiff saw McArthur approximately five times between January 5, 2006, and April 6, 2006, and then saw Dr. Ihli approximately four times between May 4, 2006, and August 25, 2006. Tr. 250-57.

At his first appointment with McArthur, plaintiff reported that he was more depressed during the week because he has less contact with his brothers and stepbrothers, his primary social contacts. Tr. 250. He also complained about being discouraged as result of his inability to keep a job. Id. McArthur noted plaintiff's additional concern that if he found a job, his benefits would be cut and he would no longer be able to afford his medications. Id. McArthur suggested that plaintiff generate ideas to increase his social activity during the week, and to use exercise to boost his mood. Id.

On January 19, 2006, plaintiff reported that his depression was a 6, on a 1-10 scale, with 10 being the most depressed. Tr. 253. He further reported that he had exercised some over the prior two weeks. Id.

On February 2, 2006, plaintiff reported his depression was a 7, on the same 1-10 scale. Id. He also again stated that he would like to get a job, but that he would lose his insurance to pay for his seizure medications and thus, did not know what to do. Id.

On February 16, 2006, plaintiff reported, as he had in the

prior sessions, of frustration with his living situation. Tr. 254. He did not rate his depression at that time, although he described feeling more depressed as a result of arguing among his mother, his aunt, and his aunt's roommate in his household. Id.

In a formal treatment plan completed by McArthur on February 16, 2006, plaintiff's GAF was 52. Tr. 251. McArthur noted that his measurable objectives included going out several times per day to ease his isolation and depression, to exercise, and to reduce his depression from an 8, on a 1-10 scale, to a 4 or 5. Id.

Plaintiff missed his appointments in March 2006 because he moved. Tr. 254. He last saw McArthur on April 6, 2006. Id. He reported his depression at an 8, on the 1-10 scale. Id. He noted increased irritability as a result of living in a new apartment with his mother. Id. He did report that socializing with his brother helped his depression to some extent. Id.

Plaintiff saw Dr. Ihli on May 4, 2006. Tr. 255. Dr. Ihle's handwritten chart notes are almost impossible to read. Tr. 255-57. As best as I can discern, plaintiff reported at this visit that his mood was at a 5 most of the time, as low as a 4 some of the time, and an 8 at its highest. Tr. 255. Plaintiff described continued frustration with this mother, and hopelessness. Id.

On June 20, 2006, plaintiff reported that he was doing "pretty well." Tr. 256. On July 12, 2006, plaintiff again reported that he was doing "all right." Id. Dr. Ihli also wrote a formal treatment plan on that date, indicating that the goal was to achieve an improved stable mood, with a reasonable amount of recreational activities. Tr. 252. Plaintiff was to, hopefully, achieve a mood of "6" or better, most of the time, and would plan

and do at least one activity that gets him out of the house, each day. Id.

On August 25, 2006, Dr. Ihli noted that plaintiff again reported that he was doing "all right." Tr. 257.

II. Plaintiff's Testimony

Plaintiff testified that while he graduated from high school with a regular diploma, he had taken special education classes. Tr. 279. He described difficulties with reading, specifically, in comprehension, requiring him to reread material. Tr. 280. He stated that he has had the reading problem throughout school, and continuing to the present. Id. He also described problems in math, including an inability to add in his head, necessitating that he write things out on paper. Id. He further noted that his math skill impairment impacts his daily life in such activities as the ability to make change and the ability to maintain a checking account. Tr. 280-81.

Plaintiff testified that his reading and math difficulties have impaired his ability to work because in past jobs, he could not comprehend what was going on and people had to explain things to him over and over again. Tr. 282-83.

Plaintiff stated that he had done janitorial work for five or six months just out of high school. Tr. 284-85. He worked for a company that made "ribbons for computers" and printers, but it lasted only two weeks because he was too slow. Tr. 285-86. He later worked for a little over a year as a punch press operator. Tr. 286. While he was there, the company sped up the manufacturing process by adding a robot, and plaintiff could no longer keep up. Id. He was laid off. Id. He worked at other punch press operator

positions, but had trouble keeping up with those as well. Tr. 287. Plaintiff also worked for Jeld-Wen, putting protective caps on windows before shipping, but he could not lift the windows because of his shoulder and left the job after three months. Tr. 287-88. Plaintiff further described a series of other jobs that he held for short periods of time. Tr. 289-91.

Plaintiff stated that his medications controlled his grand mal seizures. Tr. 291. At the time of the hearing, he was still taking 750 milligrams of Depakote three times per day, and 100 milligrams of Lamictal, two times per day. Id. He also takes medications for acid reflux and insomnia. Id.

Plaintiff described the side effects of his seizure medications as shaking, slowing down his thought process, and slurring his speech. Tr. 292. He further described the tremors as head and hand shaking. Id.

He explained that while the grand mal seizures are controlled, he still experiences periods when he "zones out," when he stares into space for ten to fifteen minutes, and his head moves a little bit. Tr. 293. These occur two times per day. Id.

Plaintiff attested to problems with memory. Id. He sometimes forgets to take his medication, or he forgets what he went to the store to purchase once he is there. Tr. 294. He has difficulty with comprehension. Id. He has a hard time with simple instructions and must read written instructions several times to try to understand the meaning. Id.

Plaintiff described feeling stress under pressure. Tr. 295. He gets irritated and angry when he cannot do something quickly. Id. He has a hard time performing even simple tasks quickly and

described himself as being slower than normal. Id. As an example, he stated that cooking or washing dishes are routine tasks that he cannot perform quickly. Id.

Plaintiff stated that his left shoulder mobility is limited following a dislocation and surgery. Tr. 297. He takes Tylenol for any problems with his shoulder. Id.

III. Lay Witness Testimony

Plaintiff's mother, Patricia Males, testified at the hearing. She noted that plaintiff has trouble with his memory, and gave the example of being unable to finish making a sandwich because he has forgotten what to put on it. Tr. 302. She also mentioned that he forgets why he goes to the store. Id. She indicated that he has problems at times with his medications because he forgets that he has taken them. Tr. 305.

She stated that plaintiff was not good at math. Tr. 302. He counts on his fingers and is not good at making change or balancing a checkbook. Tr. 303. He also has a hard time filling out forms because of his failure to comprehend that it is asking. Id.

Plaintiff's mother clarified that she believed plaintiff's "zone outs" are actually called petit seizures, and that they last ten or fifteen minutes. Tr. 303-04. During that time, plaintiff is unresponsive. Tr. 304. She could not estimate how often they occur, but said she had observed three or four herself. Id.

IV. Vocational Expert Testimony

Vocational Expert (VE) Gail Young testified at the hearing. The ALJ posed a hypothetical to the VE which first included the left upper extremity limitations assessed by Dr. Kehrli. Tr. 309. Additionally, he included a limitation to routine, repetitive work.

Id. In response, the VE testified that plaintiff could return to his prior work. Tr. 310.

Alternatively, the ALJ asked the VE whether, taking the exertional and non-exertional limitations already posed, and considering plaintiff's age, education, and prior work experience, there were other jobs existing in the state or several regions of the country, that the person could perform. Id. The VE identified general assembly work, electronics worker, packing line worker, and hand packers, as such jobs the person could perform. Tr. 310-12.

THE ALJ'S DECISION

The ALJ determined that plaintiff had not engaged in substantial, gainful activity since March 1, 2002, plaintiff's alleged onset date. Tr. 16. He next determined that plaintiff suffered from the severe impairments of a seizure disorder and left shoulder injuries. Id. The ALJ concluded that plaintiff's depression was not a severe impairment. Tr. 16-17. The ALJ then determined that plaintiff's impairments, either singly or in combination, did not meet or equal a listed impairment. Tr. 17.

Next, the ALJ determined plaintiff's residual functional capacity (RFC). Tr. 17-19. He concluded that plaintiff has the RFC to lift twenty-five pounds occasionally and frequently with the left upper extremity, and no limitations in lifting or carrying with the right upper extremity. Id. He concluded that plaintiff could stand and walk six hours out of an eight-hour day, and sit about six hours out of an eight-hour day. Id. He determined that plaintiff could occasionally climb ramps and stairs, but could not climb ladders, ropes, or scaffolds. Id. He limited plaintiff to occasional overhead reaching with the left upper extremity. Id.

He further limited him to routine, repetitive work. Id. He also found that he should avoid concentrated exposure to hazards. Id.

As part of this determination, the ALJ, as discussed more fully below, found that plaintiff's subjective testimony was only partially credible and that plaintiff's mother's testimony was also only partially credible. Id. Based on the RFC, the ALJ concluded that plaintiff was able to perform his past relevant work. Tr.19. Alternatively, the ALJ concluded that considering plaintiff's age, education, work experience, and RFC, he could perform the jobs of production assembler, electronics worker, packing line worker, and hand packer, all existing in significant numbers in the national economy. Tr. 19-20. Thus, the ALJ concluded that plaintiff was not disabled.

STANDARD OF REVIEW & SEQUENTIAL EVALUATION

A claimant is disabled if unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months[.]" 42 U.S.C. § 423(d)(1)(A). Disability claims are evaluated according to a five-step procedure. Baxter v. Sullivan, 923 F.2d 1391, 1395 (9th Cir. 1991). The claimant bears the burden of proving disability. Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989). First, the Commissioner determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520(b), 416.920(b). In step two, the Commissioner determines whether the claimant has a "medically severe impairment or combination of impairments." Yuckert, 482 U.S. at 140-41; see

20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not disabled.

In step three, the Commissioner determines whether the impairment meets or equals "one of a number of listed impairments that the [Commissioner] acknowledges are so severe as to preclude substantial gainful activity." Yuckert, 482 U.S. at 141; see 20 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively presumed disabled; if not, the Commissioner proceeds to step four. Yuckert, 482 U.S. at 141.

In step four the Commissioner determines whether the claimant can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can, he is not disabled. If he cannot perform past relevant work, the burden shifts to the Commissioner. In step five, the Commissioner must establish that the claimant can perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) & (f). If the Commissioner meets its burden and proves that the claimant is able to perform other work which exists in the national economy, he is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

The court may set aside the Commissioner's denial of benefits only when the Commissioner's findings are based on legal error or are not supported by substantial evidence in the record as a whole. Baxter, 923 F.2d at 1394. Substantial evidence means "more than a mere scintilla," but "less than a preponderance." Id. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id.

DISCUSSION

Plaintiff contends that the ALJ erred by (1) determining that

plaintiff's depression was not a severe impairment; (2) determining that the side effects of plaintiff's anti-convulsant medications did not impact his functional ability to perform substantial gainful activity; (3) failing to assess all of plaintiff's impairments in combination; and (4) determining that plaintiff could perform his past relevant work. I address the arguments in turn.

I. Depression

The ALJ rejected depression as a severe impairment. Tr. 16-17. The ALJ acknowledged that plaintiff reported depression with low mood, fatigue, lack of energy, weight gain, feelings of guilt and worthlessness, poor concentration, and disturbed sleep, to therapist McArthur in December 2005. Tr. 16. The ALJ noted that McArthur diagnosed plaintiff with major depressive disorder in a report cosigned by Dr. Ihli. Id.

The ALJ explained that the counseling treatment records showed monthly counseling sessions through August 2006, revolving primarily around family stressors. Tr. 17. The ALJ remarked that plaintiff had not been prescribed anti-depressant medication, and had not alleged depressive symptoms or other mental impairment at the time of his disability benefits application. Id. The ALJ explained that there was no evidence of any work-related functional limitations related to depression. Id. He concluded that it was not a severe impairment. Id.

A severe impairment is one that limits a plaintiff's ability to perform basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). "An impairment . . . may be found not severe only if the evidence establishes a slight abnormality that has no more than

a minimal effect on an individual's ability to work." Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (internal quotation marks omitted). "Step two, then, is a de minimis screening device used to dispose of groundless claims[.]" Id. (internal quotation and brackets omitted).

Plaintiff argues that the ALJ failed to recognize that plaintiff's isolation is the reason why the counseling notes primarily refer to plaintiff's problem as difficulties with his family. He notes that because he spends most of his time with his family, his counseling treatment addressed issues with them. This is not, plaintiff contends, because of a lack of depressive symptoms in other contexts, but simply a result of his particular circumstances.

Plaintiff also contends that it was error for the ALJ to rely on the fact that he does not take anti-depressant medication as an indication that his depression is not a severe impairment when the record clearly reflects that plaintiff rejected the medication out of fear of it adversely reacting with his anti-seizure medication. E.g., Tr. 248, 250, 253.

Finally, plaintiff faults the ALJ for not recognizing Dr. Ihli's GAF score of 52. A GAF of 52 falls in the range for moderate symptoms, suggested by flat affect and circumstantial speech or occasional panic attacks, or moderate difficulty in social, occupational, or school functioning, suggested by no friends or an inability to keep a job. American Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 34 (4th ed., Revised 2000).

In response, defendant notes that plaintiff told Dr. Syna that

he had mild depression, which defendant contends is a non-severe impairment. See 20 C.F.R. § 404.1520a(d)(1) (noting that when SSD undertakes to evaluate a mental impairment, the evaluation includes rating the degree of the claimant's functional assessment in four areas and if the degree of limitation is mild, defendant will generally conclude that the impairment is not severe); 20 C.F.R. § 416.920a(d)(1)(same).

Defendant acknowledges that Dr. Ihli's diagnosis was of moderate depression based on the GAF of 52. Defendant concedes that a moderate mental impairment is a severe impairment. As recently explained by the Eastern District of Texas:

> There is more than a semantic difference between the terms "mild" and "moderate." Mental impairments are evaluated according to a five-point scale: "none, mild, moderate, marked, and extreme." See 20 C.F.R. § 404.1520a(c)(4) (2005). The first two points on the scale, i.e. "none" and "mild" do not indicate a severe impairment. Id. The last point on the scale, i.e., "extreme" represents a degree of limitation presumptively incompatible with ability to do any gainful activity. Id. The middle point, "moderate", while not presumptively disabling, nevertheless represents a severe impairment. Id.

Allsbury v. Barnhart, 460 F. Supp. 2d 717, 727 (E.D. Tex. 2006).

Defendant contends, however, that while a moderate limitation is a severe impairment, the ALJ weighed the evidence, noted the lack of prescribed anti-depressant medication or stated functional limitations due to depression, and found it non-severe.

The ALJ erred in finding plaintiff's depression to be non-severe. First, much like the inappropriateness of drawing a negative inference from claimant's failure to seek medical treatment because of an inability to pay, it was inappropriate for the ALJ to diminish plaintiff's depression because of his failure

to take anti-depressants when plaintiff's reluctance to do so is based on his fear that the anti-depressants will interfere with the anti-seizure medications. See Orn v. Astrue, 495 F.3d 625, 638 (9th Cir. 2007) (an "'adjudicator must not draw any inferences about an individual's symptoms and their functional effects from a failure to seek or pursue regular medical treatment without first considering any explanations that the individual may provide, or other information in the case record, that may explain infrequent or irregular medical visits or failure to seek medical treatment[.]'") (quoting Social Security Regulation (SSR) 96-7p at 7-8).

Second, while plaintiff may have told Dr. Syna that his depression was mild, it is notable that Dr. Syna's actual diagnosis was "depression," without reference to the degree of depression plaintiff was experiencing. Tr. 260. Additionally, the report of Dr. Syna is entitled to less weight than the diagnosis and treatment records of Dr. Ihli, because Dr. Ihli, who specializes in mental health issues, was a treating practitioner who saw plaintiff several times, while Dr. Syna, who specializes in neurology, saw plaintiff only once for an evaluation of his seizures.

Third, defendant's own memorandum notes plaintiff's contention that he has difficulty interacting with others. Deft's Mem. at p. 7. The counseling treatment records refer to his irritability and frustration with others, as well as his isolation. E.g., Tr. 250 (discussed ways to increase his social activity); 251 (objective is to go out several times a day to ease isolation and depression); 252 (goal is to obtain a reasonable level of recreational activities with an objective of plaintiff planning and doing at

least one activity that gets him out of the house each day); 254 (frustration with members of family and extended family living in apartment, causing insomnia and increasing depression); 254 (increased irritability as a result of conflict with mother). Accordingly, while the record lacks express reference to an actual history of workplace functional limitations caused by the depression, there is evidence of at least minimal difficulty interacting with people, especially those in close quarters, which might be found in a work setting. Thus, the ALJ erred in finding plaintiff's depression to be non-severe.

Alternatively, defendant argues that even if the ALJ erred in finding plaintiff's depression non-severe, any such error was harmless because the ALJ accounted for the impairment by limiting him to routine, repetitive work. I disagree.

A step two error may be harmless if the ALJ accounts for the impairment later in the sequential evaluation process. Lewis v. Astrue, 498 F.3d 909, 911 (9th Cir 2007) (step two error harmless because ALJ considered limitations at step four). Defendant contends that by limiting plaintiff to routine, repetitive work in unskilled jobs, the ALJ addressed plaintiff's social limitation.

As support, defendant initially cites to 20 C.F.R. §§ 404.1568(a), 416.968(a). However, neither of these regulations stand for such a proposition. These regulations define unskilled work as

> work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. For example, we consider jobs unskilled if the primary work duties are handling, feeding and offbearing (that is, placing or removing materials from machines which are automatic or operated by others), or machine

> tending, and a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed.

20 C.F.R. §§ 404.1568(a), 416.968(a). The regulations make no mention of limited interaction with coworkers, supervisors, or the public.

Defendant next cites to SSR 85-15 which generally addresses evaluation of solely nonexertional impairments. SSR 85-15 (available at 1985 WL 56857). In a section entitled "Mental Impairments," the regulation notes that

> [t]he basic demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting.

1985 WL 56857, at *4. While the regulation goes on to note that unskilled "jobs ordinarily involve dealing primarily with objects, rather than with data or people," id., this does not negate the previously stated basic demand of unskilled work that the claimant be able to appropriately respond to supervision and coworkers. Moreover, the regulation addresses claimants whose sole limitation is nonexertional, which is not the case here.

Because the ALJ's limitation to routine, repetitive, unskilled jobs does not categorically address a social limitation of difficulty interacting with others, the ALJ's step two error is not harmless.

II. Medication Side Effects

Plaintiff argues that the ALJ failed to consider the effects of his anti-seizure medication on his overall ability to function. Plaintiff notes that he consistently reported tremors in both his

hands and head to the point that it impacted his work performance. He further notes his reports of slow thinking and response, affecting his motor function. He argues that the ALJ erred by failing to consider his and his mother's consistent testimony regarding the effects of his medication and his inabilities to perform simple math, balance a checkbook, and complete forms.

The ALJ concluded that while plaintiff's impairments could cause some of his alleged symptoms, plaintiff's testimony regarding the intensity, persistence, and limiting effects of these symptoms were not entirely credible. Tr. 17.

In the Ninth Circuit, once a claimant produces objective medical evidence of an impairment or impairments and shows that the impairment or combination of impairments could reasonably be expected to produce some degree of symptom, clear and convincing reasons are needed to reject a claimant's testimony if there is no evidence of malingering. Smolen v. Chater, 80 F.3d 1273, 1281-82 (9th Cir. 1996). When determining the credibility of a plaintiff's limitations, the ALJ may properly consider several factors, including the plaintiff's daily activities, inconsistencies in testimony, effectiveness or adverse side effects of any pain medication, and relevant character evidence. Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995).

Here, the ALJ noted plaintiff's inconsistent statements, his questionable motivation to work, and his ability to work after his alleged disability onset date, as the bases for rejecting the excess symptom testimony. Tr. 17-19. First, the ALJ noted that plaintiff's statements of his frequent petit mal or "zoning out" seizures was not supported by the treatment record given that in

December 2004, he reported that these episodes had not occurred in a couple of years. Tr. 18, 259.

The ALJ further noted that a February 2003 neurological exam by Dr. Koller revealed that plaintiff's speech was fluent and that he was able to follow complex commands without difficulty, although he seemed slow to respond. Tr. 18, 218. The ALJ noted that Dr. Koller wrote that plaintiff's neurologic exam was unremarkable. Tr. 18, 219. The ALJ remarked that plaintiff himself reported to Dr. Koller that while he was a little bit slow in his thinking and speech, he was doing reasonably well and that he was on unemployment and looking for work. Tr. 18, 217. The ALJ also noted that plaintiff has a driver's license. Id.

Second, the ALJ noted that the record revealed that plaintiff led an active lifestyle including looking for work, driving, doing errands for his mother, and driving family members to work. Tr. 18, 217, 253. He remarked that plaintiff reported that he would like to work, but feared losing his ability to obtain his medications through, presumably, the Oregon Health Plan, should he obtain a job. Tr. 18, 250, 253.

Third, the ALJ noted that the record showed that in 2003, plaintiff worked in a market, but left employment there not because he was unable to perform the job, but because of fear generated by the stabbing of a prior employee. Tr. 18, 222. Notably, plaintiff held this job after his alleged March 1, 2002 onset date.

As noted above, daily activities and inconsistent statements are proper bases for discrediting a plaintiff's subjective testimony. Orteza, 50 F.3d at 750; see also Light v. Social Sec. Admin, 119 F.3d 789, 792 (9th Cir. 1997) (in weighing a claimant's

credibility, the ALJ may consider inconsistencies in claimant's testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians).

A claimant's lack of motivation to work may also be a relevant credibility factor. See Osenbrock v. Apfel, 240 F.3d 1157, 1165-66 (9th Cir. 2001) (affirming ALJ's determination that plaintiff's testimony lacked credibility when, inter alia, plaintiff was unmotivated to change his lifestyle). Undoubtedly, plaintiff's predicament of being forced to choose between required prescription medications on the one hand and a job on the other, imposes a Hobson's choice on plaintiff. Nonetheless, I cannot conclude that the ALJ erred by relying on plaintiff's testimony showing a motive to avoid work because of a fear of the loss of his medical benefit and not because of any functional limitations caused by an impairment.

Additionally, the ALJ did not err by relying on plaintiff's post-onset date work activity and the fact that it ended for reasons unrelated to an impairment. Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006) (affirming ALJ's rejection of plaintiff's subjective testimony when evidence showed, inter alia, that plaintiff continued to work after last insured date); Bruton v. Massanari, 268 F.3d 824, 828 (9th Cir. 2001) (affirming ALJ's rejection of plaintiff's subjective testimony when evidence showed, inter alia, that plaintiff left work because he was laid off, not because of his impairments).

Based on the record as a whole, substantial evidence in the record supports the ALJ's credibility determination regarding plaintiff's subjective limitations and symptom testimony. The ALJ

did not err in this regard.

As to plaintiff's mother's testimony, lay witnesses are not competent to testify to medical diagnoses, but they are competent to testify as to a plaintiff's symptoms or how an impairment affects his or her ability to work. Stout v. Commissioner, 454 F.3d 1050, 1053 (9th Cir. 2006). The ALJ may disregard a lay witness's testimony by offering reasons germane to the witness. Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993). If the ALJ notes "arguably germane reasons" for dismissing the lay witness testimony, he is not required to "clearly link his determination to those reasons." Lewis v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001).

Here, the ALJ concluded that plaintiff's mother's testimony was not entirely credible in light of plaintiff's treatment record. Tr. 18. As with plaintiff's testimony, the ALJ noted that the record showed that in December 2004, plaintiff stated he had not experienced a petit mal or "zoning out" seizure for a couple of years, contradicting the subjective testimony on this point. Also, the ALJ noted that while plaintiff may have some memory problems, as testified to by plaintiff's mother in her examples of plaintiff forgetting why he went to the store or how to make a sandwich, there was no difficulty in performing routine, repetitive tasks. Tr. 18. The ALJ gave "arguably germane reasons" for dismissing these aspects of plaintiff's mother's testimony.

III. Combination of Impairments

Plaintiff contends that the ALJ erred by failing to consider plaintiff's grand mal seizure disorder in combination with (1) medication side effects causing decreased motor and mental function; (2) impaired intellectual functioning with learning

disabilities; (3) slow comprehension and completion of tasks, along with memory problems; (4) shoulder problems; and (5) chronic depression.

Plaintiff's argument is a bit unclear in that although he refers to a combination of impairments, he appears to direct his argument more to the ALJ's RFC finding rather than to an error made at step two (requiring determination of whether a combination of impairments is severe), or step three (requiring determination of whether a combination of impairments meets or equals a listed impairment). I do not view this as a step two argument because plaintiff does not argue that each one of these alleged functional limitations is an independent impairment. While he contends, for example, that he experiences decreased motor and mental functioning from the medication side effects, he does not contend that this is a separate impairment. See 42 U.S.C. §§ 423(d)(3), 1382c(a)(3)(D) (a "'physical or mental impairment'" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."). Because step two addresses the severity of an impairment or a combination of impairments, and plaintiff does not appear to contend that these limitations meet the definition of an impairment, this is not a step two argument.

It also does not appear to be a step three argument because plaintiff fails to identify the listed impairment his combination of functional limitations equals or meets. As it is plaintiff's burden to establish disability and he bears the burden of proof through step four, he has not established that a combination of impairments equals or meets a listed impairment.

Accordingly, I view plaintiff's argument here as addressed to the ALJ's failure to include all of the alleged functional limitations in the RFC.[5] Considering the argument in this vein, I agree with plaintiff in part.

First, the ALJ failed to consider any functional limitations as a result of plaintiff's depression. The record suggests that the depression affects plaintiff's interactions with people. The ALJ erred by not making clear the degree of work-related functional limitation caused by the depression and, if appropriate, incorporating any such limitation into the RFC.

Second, while the ALJ did not err in rejecting certain parts of plaintiff's and his mother's testimony regarding plaintiff's slowness in thinking and memory problems, or the testimony that he frequently experienced petit mal or "zoning out" seizures, the ALJ failed to account for the treating and examining physicians' notes of hand and head tremors. E.g., Tr. 215 (Dr. Reid observed mild hand tremor in April 1999); 213 (Dr. Gancher observed lateral head tremor in May 1999); 210 (Dr. Gancher observed slight head tremor and barely discernable hand tremor in March 2001); 209 (Dr. Reid observed slight bilateral hand tremor in March 2001); 221 (Dr. El-Attar observed bilateral hand tremor in May 2004); 260 (Dr. Syna observed mild head and hand tremors in December 2004).

While these are uncontradicted medical findings that the ALJ was obligated to accept, the record lacks information as to what,

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[5] I assume this was defendant's understanding of plaintiff's argument as well, given that defendant's response memorandum did not address this as a step two or step three argument. Notably, plaintiff did not file a reply memorandum.

if any, work-related functional limitations these symptoms produce. The ALJ was under a duty to develop the record in this regard.

Additionally, at least one treating physician, Dr. Gancher, reported that plaintiff had slowed mentation and difficulty concentrating. Tr. 210. The ALJ failed to discuss this or indicate how his RFC addressed this limitation.

Third, I reject plaintiff's argument to the extent that he contends the ALJ failed to account for his shoulder problems in the RFC. To the contrary, the ALJ relied on the RFC assessment completed in July 2004 by Dr. Kehrli. Tr. 17, 309. He limited plaintiff to "lift[ing] 25 pounds occasionally and frequently with the left upper extremity."[6] Tr. 17. He further limited him to occasional overhead reaching with the left upper extremity. Id.

In support of these shoulder limitations, the ALJ generally credited plaintiff's subjective testimony. Tr. 18. The ALJ explained that while plaintiff had some limitations in overhead activities and lifting with the left arm, there was no evidence of other restrictions. Id. He noted that plaintiff took only Tylenol for pain, and had received no other treatment in recent years. While a May 2004 consultative examination showed some tenderness to palpation in the anterior region of the shoulder joint, there was no swelling or atrophy, range of motion was only slightly decreased, and he had full strength in all extremities. Id. Substantial evidence in the record supports the ALJ's RFC determinations as to plaintiff's shoulder.

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[6] As noted above in Footnote #4, the references to both frequently and occasionally are a bit unclear.

IV. Prior Work

Finally, plaintiff contends that the ALJ erred by determining that he could return to his prior work as a punch press operator and as a janitor. Plaintiff argues that the record shows he cannot maintain average pace on the job due to the combination of exertional and nonexertional factors. He notes that the VE testified that a person who cannot maintain average pace in performing basic tasks could not perform the employment the VE identified in response to the ALJ's hypotheticals. Based on that testimony, plaintiff asks that the ALJ's decision be reversed and remanded for a determination of benefits.

I agree with plaintiff that the ALJ's decision is not fully supported by substantial evidence in the record and thus, remand is required. I do not accept plaintiff's argument that the record demonstrates his inability to maintain average pace in the jobs identified by the ALJ requiring a remand for benefits.

As noted above, the ALJ erred in failing to consider whether certain impairments (depression) or symptoms (tremors, slowed mentation, difficulty concentrating), as identified by the treating and examining physicians or psychologist, cause work-related functional limitations. While the ALJ had a sufficient basis for rejecting plaintiff's and his mother's credibility testimony, other evidence in the record creates questions about plaintiff's condition that the ALJ left unaddressed, requiring a remand for further proceedings.

As a result of plaintiff's subjective testimony being discredited, the record lacks support for the hypothetical posed to the VE by plaintiff's counsel regarding an inability to maintain

average pace. Accordingly, it would be inappropriate to rely on that VE opinion to make an award of benefits. However, remand for further proceedings is appropriate because the ALJ's failure to address possible work-related functional limitations renders his RFC invalid and thus, his conclusions at step four and step five are not supported by substantial evidence in the record. See Osenbrock, 240 F.3d at 1163-64 (hypothetical posed to the VE must be accurate, detailed, supported by the medical record, and reflect each of the plaintiff's limitations).

CONCLUSION

I recommend that the Commissioner's decision be reversed and remanded for further proceedings.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due January 10, 2008. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

If objections are filed, a response to the objections is due January 24, 2008, and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

Dated this 26th day of December, 2007.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge